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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ROBERT E. HATFIELD,

Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the adoption by the Secretary of Transportation of the MUTCD as the national standard for traffic control devices preempt state law regarding railroads' duty to protect the public at dangerous grade crossings?

2. Subsequent to the passage of the Federal Railroad Safety Act, what is a railroad's duty of care as the same relates to specific grade crossings it passes through?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the Court below appear in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert E. Hatfield, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on March 6, 1992. Petitioner's suggestion for a rehearing *en banc* was denied April 23, 1992.

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is reported at 958 F.2d 320 (10th Cir. 1991), and is reprinted as Appendix A.

The Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's suggestion for rehearing *en banc* was entered April 23, 1992, and is reprinted as Appendix D.

The Memorandum and Order of the United States District Court for the District of Kansas is reported at 757 F.Supp. 1198 (D.Kan. 1991), and is reprinted as Appendix B.

The Order of the District Court for the District of Kansas Amending Prior Memorandum and Order to Include Findings Pursuant to 28 U.S.C. § 1292(b), filed February 19, 1991, is reprinted as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered in this case on March 6, 1992. A suggestion for rehearing *en banc* was timely filed

by Petitioner on March 20, 1992, which suggestion was denied by Order of the United States Court of Appeals for the Tenth Circuit on April 23, 1992. Jurisdiction to review this case by writ of *certiorari* is conferred on this Court by 28 U.S.C. § 1254(1). Such jurisdiction is invoked by filing this petition for a writ of *certiorari* within 90 days from March 6, 1992, as provided by 28 U.S.C. § 2101(c) and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Article VI, Clause 2:

   The Constitution, and the Laws of the United States, which shall be made in Pursuance thereof . . . shall be the supreme law of the Land;

2. Federal Railroad Safety Act provisions:

   45 U.S.C. § 421: The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

   45 U.S.C. § 433: (b) . . . the Secretary shall, insofar as practicable, under the authority provided by this title and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, as well as measures to protect pedestrians in densely populated areas along railroad rights-of-way.

   45 U.S.C. § 434: The Congress declares that laws, rules, regulations, orders, and standards relating to

railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

3. Code of Federal Regulations provisions:

23 C.F.R. 655.603: (a) *National MUTCD.* The MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a). The national MUTCD is specifically approved by the FHWA for application on any highway project in which Federal highway funds participate and on projects in federally administered areas where a Federal department or agency controls the highway or supervises the traffic operations.

(b) *State or other Federal MUTCD.* (1) Where State or other Federal agency MUTCDs or supplements are required, they shall be in substantial conformance with the national MUTCD. Changes to the national MUTCD issued by the FHWA shall be adopted by the States or other Federal agencies within 2 years of issuance . . .

4. *Manual on Uniform Traffic Control Devices,* 1988 Ed.:

8A-1 Functions

Traffic control systems for railroad-highway grade crossings include all signs, signals, markings, and illumination devices and their supports along highways approaching and at

railroad crossings at grade. The function of these systems is to permit safe and efficient operation of rail and highway traffic over crossings. Traffic control devices shall be consistent with the design and application of the standards contained herein. For the purpose of installation, operation, and maintenance of devices constituting traffic control systems at railroad-highway grade crossings, it is recognized that any crossing of a public road and a railroad is situated on right-of-way available for the use of both highway traffic and railroad traffic on their respective roadways and tracks.

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

The underlying case is a personal injury action based on injuries sustained by Plaintiff Robert E. Hatfield (hereinafter Mr. Hatfield or Petitioner) in a vehicle/train collision which occurred on September 29, 1987. The initial petition was filed September 11, 1989 in the Federal District Court for the District of Kansas. Federal jurisdiction

was based on diversity of citizenship of the parties and a controversy exceeding the sum or value of $50,000, pursuant to 28 U.S.C. § 1332.

Defendant Burlington Northern Railroad Co. (hereinafter BN) filed a motion for partial summary judgment on October 14, 1990. The motion asked the district court to rule, as a matter of law, that the Plaintiff's claims premised on BN's failure to provide additional warning devices at the accident site were barred by federal preemption. Additionally, BN contended that the State of Kansas, in conformity with federal requirements, had effectuated a shift of the duty to provide grade crossing warnings from the railroads to the public authorities.

BN's motion for partial summary judgment was denied by District Court Judge Patrick F. Kelly in a Memorandum and Order filed on February 7, 1991. Upon motion of BN, the District Court amended its order on February 19, 1991, to include findings pursuant to 28 U.S.C. § 1292(b) necessary for an interlocutory appeal.

BN filed its Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on April 18, 1991. Judgment was entered by the Tenth Circuit on March 6, 1992, reversing the judgment of the District Court.

Mr. Hatfield filed a Suggestion for Rehearing En Banc on March 20, 1992. The Suggestion was denied on April 23, 1992.

REASONS FOR GRANTING PETITIONER'S WRIT

INTRODUCTION

Within the U.S. Department of Transportation are numerous subdepartments, among which are the Federal Highway Administration (FHWA) and the Federal Railroad Administration (FRA). The Federal Railroad Safety Act (FRSA), codified at 45 U.S.C. § 421 *et seq.*, was enacted in 1970 in response to a steady increase in train accidents and the growing use, and resulting transportation, of hazardous materials. The stated purposes of the FRSA are promoting safety in all areas of railroad operations, reducing railroad-related accidents, and reducing deaths and injuries. Subsection 433 instructs the Secretary of Transportation to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . . " 45 U.S.C. § 433(b).

The FRSA next contains the following provision:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. 45 U.S.C. § 434.

The FHWA's statutory authority is found in Title 23 of the U.S. Code. The pertinent sections of Title 23 are the Federal-Aid Highway Act (FAHA), 23 U.S.C. § 101 *et seq.*, and the Federal Highway Safety Act (FHSA), 23 U.S.C. § 401 *et seq.* The FAHA was enacted to accelerate the construction of the Federal-aid highway systems, since

many of the existing highways were perceived to be inadequate for interstate commerce and national and civil defense. 23 U.S.C. § 101(b). The Federal Highway Safety Act does not have a stated purpose, but does instruct the Secretary to assist and cooperate with federal, state and local governmental units to "increase highway safety." 23 U.S.C. § 401.

The regulations promulgated by the FHWA are located generally in 23 C.F.R. Within 23 C.F.R. the following regulation appears:

> The Manual on Uniform Traffic Control Devices approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. § 109(d) and § 402(a). 23 C.F.R. 655.603.

From the federal enactments set out above, the Tenth Circuit in *Hatfield v. Burlington Northern Railroad Company*, 958 F.2d 320 (10th Cir. 1992) (hereinafter referred to as *Hatfield*) has found what it believes to be an intent by Congress to "invade the field of grade crossing safety devices." *Id.* at 323. This invasion, so the Court states, includes a total preemption of any common law duty to maintain a safe crossing which may be imposed upon a railroad by state law. Finding no duty on the part of the railroad, the Court concluded that no tort liability could be apportioned to the railroad for failure to maintain a safe crossing. The Tenth Circuit's opinion is far afield from the opinions of the other three federal circuits which have considered the issue. Additionally, Petitioner believes the Court has applied the wording of the MUTCD far too broadly, as will be set forth below.

1. Conflict exists between federal circuits.

Four federal appellate courts, including the Tenth Circuit in the case at bar, have ruled to date on the question of federal preemption of the railroad's duty at grade crossings. The first, *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) holds that while the FRSA does preempt decisions as to crossing protection, the preemption does not occur when the regulation is passed. Rather, it occurs when specific action is taken by the federal government acting through the local agency whereby a decision is made as to the adequacy of the warning devices at the crossing. *Id.* at 1154. It is clear from the *Marshall* decision that the court does not agree with the Tenth Circuit's blanket approach of "once for all" preemption by the adoption of the MUTCD.

> The Railroad Safety Act preempts only those state laws where the federal government has acted with respect to the same 'subject matter.' The Railroad Safety Act does not occupy the field. *Id.* at 1153.

The second federal appellate case to consider whether state negligence law is preempted by the FRSA was *Karl v. Burlington Northern Railroad Company*, 880 F.2d 68 (8th Cir. 1989), *rehearing and rehearing en banc denied*, 9/6/89. The Eighth Circuit found that the railroad retains a common law duty to maintain a good and safe crossing even after passage of federal legislation purporting to preempt the area of crossing safety.

The third case, *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991), concluded that the railroad's duty to maintain a safe crossing was not preempted at the time of the subject accident, but used a

slightly different line of reasoning than *Marshall*. In *Easterwood*, the state had made a determination as to what type of signal was needed, but then had decided not to install the signal for funding reasons. While the court stated that it declined to follow *Marshall*, the theme of specific preemption of a certain crossing through a federal decision remains.

> [B]ecause the state has neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability. We do hold that, in the absence of a decision by a federally designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions. *Easterwood* at 1556.

Earlier in the opinion the court noted that while broad preemptive intent was expressed in the FRSA, no such intent is expressed in the chapter on highway safety.

The *Easterwood* case is currently before this court on a Petition for Certiorari. However, Petitioner feels that even if *certiorari* is granted in *Easterwood*, Petitioner's case should also be considered by this court in order to fully clarify the area of grade crossing safety, and in particular the role of the MUTCD.

It is obvious from the diversity of the four appellate court decisions that a definitive decision by this court would be invaluable guidance to courts and litigants throughout the United States.

2. The Tenth Circuit's opinion is in error in the following respects:

A. Fails to consider the traditional presumption against preemption.

In determining whether federal law preempts state law, a court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683 (1987). The preemption of state law is not to be found absent an unambiguous Congressional mandate to that effect. *Florida Lime and Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 146-147, 83 S.Ct. 1210 (1963). Preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146 (1947). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305 (1977). The United States Supreme Court's recent decision in *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S.Ct. 2476 (1991), not only reaffirms this presumption against preemption but demonstrates that it is to be applied in a rigorous and exacting manner.

The presumption against preemption is even stronger where the alleged preemption would revoke the compensatory aspects of state tort law and no federal remedies exist. *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, (4th Cir. 1988), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260 (1988). Indeed, Petitioner is unaware of any instance

where the United States Supreme Court has found that Congress intended to preempt state tort recoveries for personal injuries where, as here, no alterative remedy for compensation is available. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 263, 104 S.Ct. 615 (1984); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64, 74 S.Ct. 833 (1954); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1062 (1984).

B. Misconstrues the authority of the MUTCD.

The MUTCD is unquestionably the national standard for all traffic control devices used on public thoroughfares in the United States. It sets out specific requirements on such subjects as color of signs and signals, shape and location of signs, and universal symbols to be used in traffic control. "[A]ll states must adopt the MUTCD and its revisions in order to receive federal highway funding. 23 C.F.R. § 655.603(b)(1)" *Hatfield* at 322.

Even though the Court recognizes that a fundamental aspect of the FAHA is its control of state highway programs through the granting or withholding of funds, it still applies the Act to railroads. Indeed, as stated above, the entire purpose of the FAHA is "to implement and carry out the provisions of Federal law relating to the administration of Federal aid for highways." 23 C.F.R. 1.1.

> The MUTCD fulfills a statutory responsibility imposed on the Secretary of Transportation in sections 109(b), 109(d), and 402(a) of 23 U.S.C. and delegated to the Federal Highway Administrator in 49 CFR 1.48(b), (c), and (n). *Federal Register*, Vol 51, No. 100, Monday, June 9, 1986, p. 20640.

It should be noted that the above-quoted Supplementary Information regarding the MUTCD does not mention any authority granted under the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* Indeed, the statutory authorities listed in the Code of Federal Regulations for 23 C.F.R., Part 655 are the following: 23 U.S.C. 101(a), 104, 105, 109(d), 114(a), 135, 217, 307, 315, and 402(a); 23 C.F.R. 1.32 and 1204.4; and 48 C.F.R. 1.48(b). None of these enactments is directly connected to the FRSA. It is thus stretching to say that the MUTCD has the preemptive power of the FRSA.

Some guidance on the interpretation of administrative enactments is provided by Executive Order No. 12612, issued by President Reagan on October 26, 1987. (The entire Executive Order is reprinted herein as Appendix E.) Particular attention is called to the following provision:

> Sec. 4 (c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

As stated above, the statute pursuant to which the MUTCD was promulgated was not the FRSA. Thus, any preemptive intent of the FRSA should not be presumed to "spill over" onto regulations passed under Title 23, the Highway Act.

Because of its reliance on the preemptive authority of the MUTCD, the Court mistakenly concludes that railroads cannot make crossing safety modifications on their own. This conclusion is refuted by 49 C.F.R. 235, a regulation promulgated by the *FRA* which sets out procedures by which railroads can modify crossings. Some modifications require an application to the regulatory agency and

some do not. The operative fact is that railroads are not in the "hands off" position regarding crossing safety proposed by the Tenth Circuit.

49 C.F.R. 235 appears to conflict with the portion of the MUTCD, paragraph 8D-1, quoted by the Tenth Circuit:

> Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

It appears to the Petitioner that the conflict can be resolved only by interpreting the MUTCD provision to mean that in order to receive federal funding the project must have received state approval. If federal funding is not involved, the railroad must look to the regulation set out above to see whether permission from the appropriate governmental unit is required for its intended actions.

It should be noted at this point that Petitioner is not suggesting that a railroad could install traffic control devices which do not conform to the requirements of the Manual. Petitioner interprets the Manual to be a standard which should be followed by any entity which installs traffic control devices. In many cases railroads do the work of installing safety devices, and then are reimbursed from state or federal funds. Obviously, non-standard work would not be reimbursed. Additionally, assuming *arguendo* that the railroads do have a duty to maintain a safe crossing, they would almost certainly be found negligent if they did not at least comply with the MUTCD. However, the regulations would be evidence of

minimum required conduct, but would not necessarily establish the required standard of care.

> Federal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971), courts should wait for a clear statement of congressional intent to work such an alteration. The Supreme Court has often counselled such hesitance. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 1062 (1984).

The MUTCD states that "determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority." MUTCD, Part VIII, at 8A-1. This language was relied upon heavily by the *Hatfield* Court. However, the Manual goes on to say, "the design, installation and operation shall be in accordance with the national standards contained herein." There is no specific statement as to what entity is responsible for installing or maintaining any devices at grade crossings, only a reference to the "joint responsibility in the traffic control function between the public agency and the railroad." Somehow from this language the Tenth Circuit has reached the conclusion that the manual makes the "installation and operation" of safety devices the complete responsibility of the agency which made the determination of need. *Hatfield* at 323. Such a conclusion is not supported by either the FHWA or the FRSA, or by the language of the Manual itself.

Additional evidence of the railroad's continuing responsibility is contained in the *Railroad-Highway Grade Crossing Handbook*, Second Edition, FHWA-TS-86-215, 1986, (hereinafter referred to as the Handbook). The Handbook states, at page 19:

> Jurisdiction over railroad-highway grade crossings resides primarily with the States. Within some States, responsibility is divided among several public agencies *and the railroad*. (emphasis added)

The language of the Handbook quoted above does not comport with the statement of the Tenth Circuit that the MUTCD "absolves the railroad of any independent duty regarding grade crossing safety devices." *Hatfield* at 323.

In a section of the Handbook entitled, "Some General Legal Considerations – Railroad-Highway Grade Crossings," the authors state that they are supplying a basic discussion of a very complex subject. Their purpose is:

> to alert transportation agencies *and railroads* of the need to recognize and respond to the possible consequences of failure to maintain and safeguard the railroad-highway grade crossing. Handbook, *supra*, at 23. (emphasis added)

Later in the same discussion, the Handbook states, "The law imposes upon states and railroads the duty to exercise reasonable care to avoid injury to persons using the highway. Handbook, *supra*, at 27. Still later, the following appears:

> It has been suggested that agencies and railroads could significantly reduce tort liability

suits involving traffic control devices by implementing four basic principles.

* Know the laws relating to traffic control devices
* Conduct and maintain an inventory of devices
* Replace devices at the end of their effective lives
* Apply approved traffic control device specifications and standards

While the Handbook does not have the force of law, it is an interpretive guide distributed by the same federal department which is responsible for implementing the MUTCD. It appears that if the railroads have no duty of care, someone should inform the FHWA.

The MUTCD itself does not contain any reference to tort liability in either the general provisions of Part I or the specific railroad crossing provisions of Part VIII. Pursuant to the cases and Executive Order quoted above, intent to preempt state law must be clearly shown to be valid.

An example of such specific preemption is contained in 23 C.F.R. 646, Subpart B – Railroad-Highway Projects. This section is very clear in stating its intent to preempt certain state laws:

> 646.210 **Classification of projects and railroad share of the cost.**
>
> (a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.

If the Tenth Circuit's interpretation is correct, it is difficult to understand why this section is included in the regulations. If all state laws concerning grade crossings were preempted the moment the MUTCD was passed, this section is mere surplusage.

The Design portion of the same regulation subpart, 646.214(b), sets out certain specifications for devices required on Federal-aid projects. It goes on to state:

> (4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, *and/or the railroad*, is subject to the approval of FHWA. (emphasis added)

Once again, the Tenth Circuit's statement that the MUTCD "absolves the railroad of any independent duty regarding grade crossing safety devices" does not comport with the actual federal enactment.

A final example of how the Court fails to properly construe the authority of the MUTCD is the fact that the Manual gives instructions as to the installation and specifications of crossbucks at crossings. The Manual does not address responsibility of any particular entity to install crossbucks, but merely states the physical requirements.

The responsibility of the railroad to install and maintain crossbucks is statutory in Kansas (K.S.A. 66-2,121). The determination of need and type of signal has been made by a regulatory agency, but the responsibility for compliance is upon the railroad. This is yet another

example of the Court's failure to fully consider the overall situation. "[W]ith the adoption of the MUTCD, the Secretary has absolved railroads from complying with duties imposed by state law regarding safety devices at grade crossings." *Hatfield* at 324. If the state law requiring the railroads to install crossbucks is no longer valid, one wonders who, if anyone, is responsible for installing crossbucks in Kansas.

C. Misconstrues purpose of MUTCD.

The purpose of the MUTCD is basic uniformity of traffic control devices. 23 C.F.R. 655.601. Common sense tells one that safety requires – no matter who installs them – all traffic control signs and signals to be uniform so drivers will readily recognize them and know how to respond. Nonetheless, that a requirement for uniform devices should be the instrument which abolishes a private individual's cause of action for negligence is nothing less than amazing to Petitioner. Just as the clear and manifest intent of Congress must be established before state law will be preempted by federal legislation, a similar manifestation of intent is necessary where the Secretary wields such power. *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-716 (1985). The Court does not cite any evidence of such an intent by the Secretary of Transportation.

D. Misconstrues Kansas law.

As further evidence the railroad has no independent duty regarding crossing safety devices, the Tenth Circuit

notes, in footnote 6 of its opinion, that Kansas Statutes Annotated (K.S.A.) 8-1512 states that no person shall place . . . any unauthorized sign or signal "which purports to be or is an imitation of or resembles an official . . . railroad sign or signal." The Court fails to note the statute in question could not be referring to railroad since K.S.A. 8-1453, the definitional section of the same statute, defines a railroad sign or signal as "any sign, signal or device erected by authority of a public body or official *or by a railroad* . . . " (emphasis added).

E. Fails to take into account overall purpose of FRSA.

The Tenth Circuit states, "Congress expressed an intent to invade the field of grade crossing safety devices, postponing that invasion only until the Secretary of Transportation adopted a rule, regulation, order, requirement, or standard *relating to* that field." *Hatfield*, at 323 (emphasis added). The Court is slightly, but significantly, altering the mandate of 45 U.S.C. § 434, which is actually that state laws, rules, etc. are to remain in force until a corresponding law, rule, etc. is adopted by the Secretary, *covering* the subject matter. This point is critical because it is obvious any action taken by the Secretary which concerns railroads will "relat[e] to" them. However, relating is far different than covering an area, which implies something much more specific and all-encompassing.

The legislative history of the FRSA does not express "an intent to invade the field of grade crossing safety devices." Neither does the Congressional Declaration of Purpose, 45 U.S.C. § 421, state that its goal is "recognition

of priorities", as found by the Tenth Circuit, *Hatfield* at 324.

An additional problem with the Tenth Circuit's reasoning is the following statement:

> Having adopted the MUTCD, the Secretary prescribed the standard required by 45 U.S.C. § 434, and any state law relating to grade crossing safety devices was then superseded. *Hatfield* at 324.

First of all, § 434 does not instruct the Secretary to adopt a standard or to take any action; it merely declares a goal of national uniformity.

Further, when Congress passed the FRSA, there was already in place a *Manual on Uniform Traffic Control Devices for Streets and Highways*, promulgated by the U.S. Department of Commerce in 1961 (before the Department of Transportation was created). The preemptive effect of the MUTCD appears somewhat more doubtful when one realizes that "the standard" the Tenth Circuit relies upon was in existence for many years before the passage of the preemptive language in the FRSA. In fact, the Introduction to the current MUTCD describes how the first attempt at developing uniform standards resulted in the original edition of the MUTCD, published in 1935.

The 1961 version of the Manual, which Petitioner believes was in effect at the time of passage of the FRSA, admittedly, does not contain the exact wording relied upon by the Court, but the wording is very similar. Under the subheading, "Responsibility for Control Devices," the Manual states:

> The responsibility for selecting, installing, operating, and maintaining traffic control devices rests with a multitude of jurisdictions. In many States, State and local officials are required by statute to conform to this Manual, or to a State manual which must be in substantial conformance with this Manual. Federal legislation provides that any signs, signals, or markings installed on highways constructed with Federal-aid funds (since December 20, 1944) shall be subject to approval of the State highway department with the concurrence of the Secretary of Commerce, who is directed by the law to concur only in installations that promote safe, efficient highway use.

The first sentence of the quoted material closely resembles the wording of section 1A-3 of the current version of the MUTCD:

> The responsibility for the design, placement, operation and maintenance of traffic control devices rests with the governmental body or official having jurisdiction.

Section 3H of the 1961 Manual, the section dealing with railroad-highway grade crossings, does not contain a placement authority statement, but does indicate that, "At railroad-highway grade crossings where studies indicate the need of protection beyond that provided by signs, signals should be installed which indicate the approach and passage of trains." *Manual on Uniform Traffic Control Devices for Streets and Highways*, U.S. Department of Commerce, June 1961, at 230. The balance of the section is devoted to describing various warning devices and technical requirements for the same.

Again, Petitioner asserts that the Tenth Circuit's reliance on the preemptive effect of the Secretary's adoption of the MUTCD is illogical since adopting the Manual was not a new step taken specifically pursuant to the mandate of the FRSA.

It cannot be emphasized enough that the overriding purpose of the FRSA is to make grade crossings safer. The Tenth Circuit states:

> Continuing to resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. *Hatfield* at 324.

The system of prioritization relied upon by the Tenth Circuit is a government prioritization for the expenditure of federal funds, and is found in the FAHA. It is based on numerous factors, including the dangerousness of the crossing, but also including the availability of resources.

> "FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys." *Hatfield* at 324.

The instant case is a good example of the problem with the Court's reasoning. The Haverhill Crossing (the site of Petitioner's accident) was placed on a state list of crossings needing improvement in February of 1984. No evidence has been produced as to what other Kansas crossings were considered higher priority in terms of needing improvement. The problem is that even though the crossing in question may be known to be extremely dangerous, it may not fall within the range of crossings

which can be improved because available funds are committed to higher priority crossings. The real purpose of the system of prioritization is to ensure federal funds are used wisely and not wasted on crossings which really do not need improvement. But no warranty is made by any regulatory agency that just because a certain crossing did not fall within the funding cutoff, that crossing is not dangerous and in need of improvement.

Another flaw in the Court's reasoning stems from the statement, "all states must adopt the MUTCD and its revisions in order to receive federal highway funding." *Hatfield* at 322. The Court fails to take into account the possibility that a state might decline to adopt the MUTCD, or that there might be a substantial delay between the Secretary's adoption and the state's adoption. "[O]nce the Secretary adopted the standard, its superseding effect became uniform throughout the nation." *Hatfield* at 324. Is the Court saying it is irrelevant whether and when each state adopts the Manual? If so, the railroad's duty was preempted by the Secretary's adoption of the MUTCD, but the state did not accept any responsibility until it adopted the Manual as state law. Such a result cannot have been intended by Congress when it passed the Rail Safety Act.

The Tenth Circuit has ruled that the railroad *could not* take any independent action regarding crossing safety devices. Apparently the Court feels it is irrelevant that a dangerous condition could arise after the state's prioritization. Even though the railroad is the party most likely to be aware of the danger, the Court refuses even to impose on the railroad a duty to urge the state to make a needed improvement.

The Court acknowledges the District Court's concern regarding the "gap period" when no one has responsibility to make a crossing safer, but dismisses the concern by pointing out language in the MUTCD which states, "Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State." MUTCD, 8D-1. Petitioner is at a loss to understand the connection.

CONCLUSION

The many inconsistencies within the Tenth Circuit's decision, as well as the inconsistencies of other Circuit Court decisions, cry out for a definitive interpretation by this Court. Petitioner, therefore, respectfully requests this Court grant *certiorari*.

Respectfully submitted,

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**Counsel of Record for Petitioner*

Robert E. HATFIELD, Plaintiff-Appellee,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, Defendant-Appellant.

No. 91-3158.

United States Court of Appeals, Tenth Circuit.

March 6, 1992.

Phillip R. Fields, Wichita, Kan., for defendant-appellant.

Timothy J. King (Terry S. Stephens, with him, on the briefs) of Stinson, Lasswell & Wilson, Wichita, Kan., for plaintiff-appellee.

Before McKAY and MOORE, Circuit Judges, and ALLEY, District Judge.*

JOHN P. MOORE, Circuit Judge.

I.

This is an interlocutory appeal under 28 U.S.C. § 1292(b) from a decision denying Burlington Northern Railroad Company's motion for partial summary judgment on the issue of whether Robert E. Hatfield's common law negligence claim arising from a grade crossing collision is preempted by the Federal Railroad Safety Act. The district court held preemption had not occurred. *Hatfield v. Burlington Northern R.R. Co.*, 757 F.Supp. 1198

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

(D.Kan.1991). We reach the opposite conclusion and reverse.

Plaintiff Hatfield filed a multi-claim complaint alleging the defendant Burlington Northern Railroad was negligent because, among other reasons, it did not install an active warning device at a grade crossing where a truck he was driving collided with one of Burlington's trains. At the time of the collision, the crossing was marked only by a standard crossbuck sign. Burlington moved for partial summary judgment on this claim, contending it had been preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421, et seq., and railroad safety rules, standards, and regulations adopted by the Secretary of Transportation.

The district court denied the motion. Analyzing the issue of preemption,[1] the court concluded Congress explicitly expressed an intent in FRSA § 434 to preempt the subject of adequate crossing warnings once the Secretary of Transportation has acted upon this subject,[2] but

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[1] State law is preempted under the Supremacy Clause of the United States Constitution in three circumstances. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). First, Congress can define explicitly the extent to which its enactments preempt state law. *Id.* Second, a pervasive scheme of federal regulation may indicate congressional intent to occupy an entire field. Third, state law is preempted to the extent it actually conflicts with federal law. *Id.*

[2] Section 434 states in part:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad

(Continued on following page)

found no such action had occurred. Despite Burlington's argument that the Secretary took that action by adopting the Manual on Uniform Traffic Control Devices on Streets and Highways (MUTCD), the court held that preemption does not occur until a formal determination is made under the MUTCD of the exact type of warning device to be installed at the crossing. Following the district court's certification under 28 U.S.C. § 1292(b), this appeal was taken.

We apply a de novo standard of review when considering a decision on summary judgment, *Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987), and we use the same standard applied in the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir.1988). If no genuine issue of material fact exists, we determine if the substantive law was correctly applied. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912

(Continued from previous page)

> safety shall be nationally uniform to the extent practicable. *A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added).

F.2d 1238, 1241 (10th Cir.1990). Because there are no disputed facts, the issue before us is ripe for summary determination.

II.

In 1970, with the adoption of FRSA, Congress required the Secretary of Transportation to study and develop solutions to problems associated with railroad grade crossings. 45 U.S.C. § 433(a) (1976). FRSA also directs the Secretary to address the grade crossing safety problem under his authority over highway traffic and safety. 45 U.S.C. § 433(b) (1976). Under the Highway Safety Act, 23 U.S.C. §§ 401-404 (1982), the Secretary has the responsibility to develop uniform standards and to approve state-designed highway safety programs as a condition precedent to the receipt by the state of federal highway funds. Through the Federal Highway Administration, the Secretary prescribed procedures to obtain uniformity in highway traffic control devices and adopted the MUTCD. 23 C.F.R. § 655.601 (1981).[3]

With this background, we begin our analysis by agreeing with the district court that § 434 of FRSA states an express preemption of state law. We also agree preemption does not occur until the Secretary adopts a rule, regulation, or standard covering the subject matter of the state law. Thus, we must determine whether any of the standards adopted by the Secretary cover the subject

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[3] Kansas has specifically adopted the MUTCD standards at Kan.Stat.Ann. § 8-2003 and Kan.Admin.Regs. 82-7-4(c) (1989).

matter of the duty to install active warning devices at railroad crossings where unusually dangerous conditions exist.[4]

III.

While this court has not addressed the question, it has arisen in other courts with mixed results. In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir.1983), the court said:

> The [MUTCD] prescribes that the selection of devices at grade crossing and the approval for federal funds is to be made by local agencies with jurisdiction over the crossing. Thus, the Secretary has delegated federal authority to regulate grade crossings to local agencies.
>
> The locality in charge of the crossing in question has made no determination under the manual regarding the type of warning device to

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[4] Courts have found the Secretary has acted upon other safety subjects. *See, e.g., Burlington Northern R.R. Co. v. State of Mont.*, 880 F.2d 1104 (9th Cir.1989) (cabooses); *Burlington Northern R.R. Co. v. State of Minn.*, 882 F.2d 1349 (8th Cir.1989) (cabooses); *Sisk v. National R.R. Passenger Corp.*, 647 F.Supp. 861 (D.Kan. 1986) (speed limit); *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990) (hazardous materials), *cert. denied*, ___ U.S. ___, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991); *Norfolk & Western Ry. Co. v. Public Utils. Comm'n of Ohio*, 926 F.2d 567 (6th Cir.1991) (walkways); *but see Southern Pac. Transp. Co. v. Public Utils. Comm'n of Cal.*, 820 F.2d 1111 (9th Cir.1987) (track clearance and walkways); *Missouri Pac. R.R. v. Railroad Comm'n of Tex.*, 850 F.2d 264 (5th Cir.1988) (cabooses), *cert. denied*, 488 U.S. 1009, 109 S.Ct. 794, 102 L.Ed.2d 785 (1989).

> be installed at the crossing. Until a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing, the railroad's duty under applicable state law to maintain a "good and safe" crossing . . . is not preempted.

Following *Marshall,* in *Nixon v. Burlington Northern R.R.,* No. CV 85-384-BLG-JFB, 1988 WL 215409 (D.Mont. May 2, 1988), the court found preemption because, prior to the incident in litigation, the State of Montana made an agreement with the railroad to install flashing light signals with automatic gates at the crossing where the incident occurred. In *Smith v. Norfolk & Western Ry. Co.,* 776 F.Supp. 1335 (N.D.Ind.1991), the court applied *Marshall* and granted partial summary judgment because prior to plaintiff's accident, the local agency determined the necessary safety devices at the crossing and certified that the project was complete. In *Anderson v. Chicago Cent. & Pac. R.R. Co.,* 771 F.Supp. 227 (N.D.Ill.1991), the court found the railroad failed to present evidence that the Illinois Commerce Commission made any determination under the MUTCD on the type of warning device to be installed at the crossing where the collision occurred.

In *Easterwood v. CSX Transp., Inc.,* 933 F.2d 1548 (11th Cir.1991), the court held preemption did not occur where a state, because of financial constraints, failed to implement a decision to install a particular signal device. Finally, in *Southern Pac. Transp. Co. v. Maga Trucking Co.,* 758 F.Supp. 608 (D.Nev.1991), although citing *Marshall,* the court found no preemption where the Nevada Public Service Commission had issued a report recommending

the crossing be upgraded with flashing lights and automatic gates, but, at the time of the accident, the improvements had not been made because the railroad claimed it had not received federal funds.

IV.

The dilemma presented by these varied results must be solved by resort to the language in the regulations adopted by the Secretary. First, all traffic control devices proposed for railroad crossings must comply with the uniform federal standards expressed in the MUTCD. 23 C.F.R. § 646.214(b)(1).[5] Second, all states must adopt the MUTCD and its revisions in order to receive federal highway funding. 23 C.F.R. § 655.603(b)(1). Third, the MUTCD standards are "intended for use both in new installations and at locations where general replacement of present apparatus is made." MUTCD, ¶ 8A-2.

Fourth, the MUTCD specifically states:

> With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of

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[5] This provision relates to "grade crossing improvements" and states: "All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards."

> devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD, Part VIII, ¶ 8A-1. This provision is particularly important for two reasons. One, it circumscribes the authority to determine what "devices" shall be erected at a grade crossing to "the public agency with jurisdictional authority." Two, it also makes the "installation and operation" of such devices subject to the determination of that agency. Thus, until a determination of need is made, no new device can be installed or operated at a crossing.

V.

The operation of ¶¶ 8A-1 and 2 results in a consequence which concerned the district court. Assuming preemption occurred when the MUTCD was adopted or when the Secretary promulgated 23 C.F.R. § 646.200, the court reasoned that a significant delay could be encountered before a safety device would be installed. The court believed this "gap period" is inconsistent with "the recognized view that '§ 434 manifests an intent to avoid gaps in safety regulations.' " *Hatfield*, 757 F.Supp. at 1205. Moreover, the court found "no regulation promulgated by the Secretary . . . which would *prohibit* a railroad from voluntarily deciding to put in place an improved warning device . . . during the gap period." *Id.* at 1206. Thus, the court reasoned, the railroad has the authority (and assumably the duty) to install an improved warning device at a dangerous crossing during the "gap period." We disagree.

The district court's conclusion overlooks the specific language of MUTCD ¶ 8D-1 which states:

> The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations. . . .
>
> Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. *Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.*

(emphasis added). This regulation effectively prohibits a railroad from acting on its own to select and install a safety device, contrary to the district court's conclusion. Moreover, it absolves the railroad of any independent duty regarding grade crossing safety devices.[6]

VI.

The scheme of regulation is patent. Congress expressed an intent to invade the field of grade crossing safety devices, postponing that invasion only until the

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[6] *See also* Kan.Stat.Ann. § 8-1512 which states: (a) No person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official . . . railroad sign or signal.

Secretary of Transportation adopted a rule, regulation, order, requirement, or standard relating to that field. The Secretary has responded by adopting the MUTCD and making it applicable to grade crossings. Recognizing the variability of conditions that can arise at each intersection, the Secretary has delegated to local authority the responsibility of assessing the needs and establishing the design for safety devices. Nonetheless, the statutory mandate for the adoption of a standard that would supplement any state requirement for grade crossing safety devices is satisfied by the adoption of the MUTCD. To that extent then, we disagree with *Marshall*.

Our disagreement with *Marshall* goes beyond our differing analysis of language in FRSA and MUTCD pertaining to preemption of common law standards of care for grade crossings, however. Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

Having adopted the MUTCD, the Secretary prescribed the standard required by 45 U.S.C. § 434, and any state law relating to grade crossing safety devices was

then superseded. All § 434 requires for preemption to occur is the adoption of the standard, and the MUTCD contains the standard. Postponing the determination of what specific device is required for a given grade crossing is simply a matter of implementing that standard. The scheme enacted by Congress did not anticipate that the effect of the standard was to be deferred or made selectively applicable for each grade crossing in the United States. To the contrary, once the Secretary adopted the standard, its superseding effect became uniform throughout the nation.

We do not believe leaving responsibility for implementation of the standard to local authority diminishes this result. Requiring a local survey of grade crossings to determine need and design is no more than a pragmatic response to the multitude of conditions that exist throughout the country which dictate whether and what kind of a device is required at a specific place. Nonetheless, with the adoption of the MUTCD, the Secretary has absolved railroads from complying with duties imposed by state law regarding safety devices at grade crossings. Without such a duty, a railroad cannot be liable in common law negligence for failure to provide adequate safety devices at a grade crossing.

The judgment of the district court is REVERSED and REMANDED with instructions to grant defendant's motion for summary partial judgment and for further proceedings on plaintiff's remaining claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT E. HATFIELD, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD, CO., Defendant and Third Party Plaintiff, vs. BINGHAM TRANSPORTATION, INC., Third Party Defendant.	)	Case No. 89-1529-K

ORDER AMENDING PRIOR MEMORANDUM AND ORDER TO INCLUDE FINDINGS PURSUANT TO 28 U.S.C. § 1292 (b)

(Filed Feb. 19, 1991)

Now on this 19 day of February, 1991, this matter comes on for hearing upon defendant's motion for an order amending this court's prior Memorandum and Order entered on February 7, 1991, to include therein certain statements required by 28 U.S.C. § 1292(b) necessary for an interlocutory appeal. The court having heard the arguments of counsel, considering the briefs filed herein, and being otherwise duly advised in the premises finds the defendant's motion should be sustained.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the Memorandum and

Order entered on February 7, 1991 is hereby amended to include the following findings:

1. This order involves a controlling question of law as to which there is substantial ground for difference of opinion.

2. An immediate appeal from this order may materially advance the ultimate termination of this litigation.

IT IS FURTHER ORDERED that said Memorandum and Order entered February 7, 1991 as hereby amended shall be deemed entered as of the date hereof for purposes of computing the allowable time for the filing of a petition for permission to appeal and for this purpose only. Further proceedings in the district court are hereby stayed pending ultimate determination of defendant's application for appeal to the 10th Circuit Court of Appeals.

/s/ Patrick F. Kelly
PATRICK F. KELLY, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT E. HATFIELD, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant and Third Party Plaintiff, vs. BINGHAM TRANSPORTATION, INC., Third Party Defendant.	)	No. 89-1529-K

MEMORANDUM AND ORDER

(Filed Feb. 7, 1991)

This is a personal injury action brought by plaintiff Robert E. Hatfield against defendant/third party plaintiff Burlington Northern Railroad Company (the railroad) for injuries sustained as a result of a truck/train collision at the Haverhill Road crossing on September 29, 1987. In a memorandum and order dated September 24, 1990, the court addressed counter-motions for partial summary judgment between the railroad and third party defendant Bingham Transportation, Inc.

This matter is now before the court on a motion for partial summary judgment filed by the railroad against the plaintiff. The railroad requests judgment against the plaintiff to the extent plaintiff's claim is premised on the

railroad's failure to install active warning devices at the Haverhill Road crossing. As more fully set forth herein, the court finds that the railroad's motion for partial summary judgment should be denied.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable, such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id.* at 249.

In considering a motion for summary judgment, this court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). Further, the party moving for summary judgment must demonstrate its entitlement beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985).

However, in resisting a motion for summary judgment, the nonmoving party may not rely upon mere allegations, or denials, contained in its pleadings or briefs. Rather, the party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegations. *Burnette v. Dresser Industries, Inc.*, 849 F.2d 1277, 1284 (10th Cir. 1988). Moreover, the moving

party need not disprove plaintiff's claim, but rather, must only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). That is, if on any part of the *prima facie* case there is insufficient evidence to require submission of the case to a jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex*, 477 U.S. at 323-24.

The following facts offered by the railroad in support of its motion are uncontroverted.

On September 29, 1987, a truck owned by Bingham Transportation and driven by plaintiff collided with the railroad's train at the Haverhill Road crossing in Butler County, Kansas. The plaintiff then brought this action against the railroad alleging, among other things, that the railroad was negligent in "[f]ailing to install active warning devices at the subject crossing to warn approaching motorists of train traffic on the crossing." (Pretrial Order, at p. 5.)

The railroad contends that a negligence claim based on its failure to provide active warning devices is preempted by federal law. The railroad further asserts that

under federal law the state, not the railroad, has the legal duty to determine the necessity of an improved warning device.

The State of Kansas receives, and for many years has received, federal highway funding pursuant to the Federal Highway Safety Act (23 U.S.C. § 101 *et seq.*).

The State of Kansas, through the Kansas Department of Transportation (KDOT), first inventoried the Haverhill Road crossing on May 1, 1972. KDOT did not recommend any improvements to the crossing as a result of that survey.

KDOT conducted an on-site inspection of the crossing on July 23, 1981 following a request from Butler County officials. KDOT did not recommend any improvements to the crossing as a result of that inspection.

In February 1984, KDOT updated its information regarding the crossing. As a result of this updated information, the crossing was placed on the improvement list for fiscal year 1985. On May 1, 1985, KDOT again conducted an on-site inspection of the crossing. As a result of the May 1985 survey, KDOT scheduled the crossing for improvements.

On December 11, 1987, Butler County officials sent a letter to KDOT indicating that on October 5, 1987, Butler County had agreed to participate in the installation of signals at the crossing. On December 28, 1987, KDOT approved a project to install signals at the crossing.

By letter dated December 28, 1987, KDOT supplied the railroad with copies of an agreement for the installation of straight post signals at the crossing and preliminary plans for installation. KDOT also informed the railroad that it would notify the railroad "in the near future to order the necessary material for this project."

On March 11, 1988, KDOT authorized the railroad "to order materials necessary for the warning devices." In that same letter, however, KDOT cautioned the railroad that "the actual installation of the warning devices cannot be undertaken until the agreements are executed by all parties and we have authorized you to proceed."

Funds were obligated on March 2, 1988 and approved by the Federal Highway Administration (FHWA) on March 14, 1988. On March 21, 1988, KDOT authorized the railroad to begin work on the installation of signals at the crossing.

On March 22, 1989, KDOT issued a notice of acceptance of the improvements. The improvements, which were begun in 1988 and completed in 1989, were scheduled as a result of the on-site inspection on May 1, 1985.

Because KDOT schedules improvements well in advance, it normally takes approximately two years from the time of inspection until the improvements are actually made at any crossing. Because the Haverhill Road crossing was placed on KDOT's improvement list in 1984, the Kansas Corporation Commission had no involvement with any proposed improvements at the crossing.

Conclusion of Law

The issue before the court is a narrow one. The railroad asserts that to the extent the plaintiff's claim is premised on the railroad's failure to provide additional or active warning devices at the questioned railroad-highway crossing, the plaintiff's claim has been pre-empted by the Federal Railroad Safety Act (FRSA). *See* 45 U.S.C. § 421 *et seq.*

For clarity, it must be noted that the plaintiff has alleged the following four separate contentions of negligence against the railroad: (1) failing to keep the subject crossing free from visual obstruction in the form of trees and shrubbery; (2) failing to install active warning devices at the subject crossing to warn approaching motorists of train traffic on the crossing; (3) failing to slow its locomotive when proceeding through the subject crossing; and (4) failing to institute additional safety precautions at the subject crossing, including "flagging the crossing," after the railroad received notification, in the form of a petition from its own employees, of the dangerous nature of the crossing. As the railroad notes in its reply, only contention No. 2 is at issue in the current motion.

Determination of whether a duty exists is a matter of law for the court to decide. *Wicina v. Strecker*, 242 Kan. 278, 280-82, 747 P.2d 167 (1987). The railroad's common law duty in Kansas is relatively clear:

> [W]here unusually dangerous conditions prevail at a railroad crossing the unusual hazard may make additional warnings and precautions by the railroad company necessary. The crux of the

> matter is simply whether the railroad has afforded users of the crossing sufficient and adequate protections under the reasonably careful person rule.

Sexsmith v. Union Pacific Railroad Co., 209 Kan. 99, 108, 495 P.2d 930 (1972). *Accord, Jennings v. Missouri Pacific Railroad Co.*, 211 Kan. 389, 394, 506 P.2d 1125 (1973) (also noted that the railroad's failure to provide a traffic control signal at a crossing may be considered as a factor which makes the crossing more than ordinarily dangerous).

It is well established that Congress has the authority, in exercising its Article I powers, to preempt state law, *California v. ARC America Corp.*, 490 U.S. 93, 104 L.Ed.2d 86, 94 (1989), and that preemption is primarily a question of congressional intent, *see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 199 [sic] (1988). Furthermore, the Supreme Court has instructed that state law is preempted under the supremacy clause of the U.S. Constitution in three circumstances. *English v. General Electric Co.*, ___ U.S. ___, 110 L.Ed.2d 65, 74 (1990).

First, Congress can explicitly define the extent to which it intends to preempt state law in enacting the federal law in question. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). Second, even in the absence of express preemptive language, a congressional intent to occupy an entire field may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947).[1] Third, state law is preempted to the extent it actually conflicts with federal law. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (where it is impossible for a private party to comply with both the state and federal law); or *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The railroad asserts that Congress clearly expressed a preemptive intent in the following provision of the FRSA:

> *The Congress declares that laws*, rules, regulations, orders, and standards *relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law*, rule, regulation, order, or standard *relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

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[1] A congressional intent to totally preempt the field will only be inferred in areas that have "been traditionally occupied by the States," if the congressional intent to supersede state laws is " 'clear and manifest.' " *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice*, 331 U.S. at 230).

45 U.S.C. § 434 (emphasis added). That section also states that the Secretary shall "prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety."

A preliminary question which must be addressed is whether the duty to install active warning devices at a dangerous railroad crossing is a law "relating to railroad safety" so that 45 U.S.C. § 434 applies. Since finding solutions to the grade crossing problem was one of the few explicitly mentioned aspects of railroad safety in the FRSA, there can be little doubt that the duty to install active warning devices at dangerous railroad crossings is a law "relating to railroad safety" within the meaning of 45 U.S.C. § 434. *See* 45 U.S.C. § 433:

> (a) The Secretary shall submit to the President for transmittal to the Congress, within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings . . . together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of such study.
>
> (b) *In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, . . .*

(Emphasis added).

This court has previously noted in *Sisk v. National R.R. Passenger Corp.*, 647 F.Supp. 861, 864 (D. Kan. 1986), a congressional intent to preempt state laws is evident from the plain language of 45 U.S.C. § 434. That is, by stating that "[a] State may adopt or continue in force any law- . . . relating to railroad safety until such time as the Secretary has adopted a rule . . . covering the subject matter of such State requirement," it necessarily follows that a state may not continue in force any law which relates to railroad safety after the Secretary has adopted a rule covering the subject matter of the state law.

Further support for a finding that Congress intended to preempt state law by enacting the FRSA can be found in the following legislative history which evinces a congressional intent to establish a nationally uniform control of railroad safety:

> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.
>
> . . . .
>
> . . . [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system. . . . To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H. R. Report No. 91-1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Admin. News 4104, 4109-11; and *CSX Transp. Inc. v. Public Utilities Com'n of Ohio*, 701 F.Supp. 608, 612 (S.D. Ohio 1988), *aff'd*, 901 F.2d 497 (6th Cir. 1990).

As a result of the explicit language in § 434 and the legislative history thereto, the court finds that Congress has explicitly defined a preemptive intent in the FRSA. As a result, the first example of preemption set forth herein applies to this case. *English*, 110 L.Ed.2d at 74 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 95-96) (finding that Congress had expressed an intent that the Employee Retirement Income Security Act, 29 U.S.C. § 1144, preempted state law). *See also CSX Transp., Inc. v. Public Utilities Com'n of Ohio*, 901 F.2d 497, 502 (6th Cir. 1990) (finding that the FRSA reveals clear preemptive purpose); *Burlington Northern Railroad Co. v. State of Mont.*, 880 F.2d 1104, 1105-06 (9th Cir. 1989) (state regulation is preempted to the extent a Federal Railroad Administration regulation covers the same subject matter); *Missouri Pacific R. Co. v. Railroad Com'n of Texas*, 833 F.2d 570, 574 (5th Cir. 1987) ("the scope of preemption under § 434 is informed by its introductory language directing the establishment of national rail safety standards 'to the extent practicable' "); *National Ass'n of Regulatory Util. Com'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) (finding that the FRSA evinces a total preemptive intent); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973) (the FRSA only "authorizes a narrow spectrum of deviation from national uniformity"). *But see Karl v. Burlington Northern, Inc.*, 880 F.2d 68, 76 (8th Cir. 1989).

Although Congress clearly expressed an intent to establish nationally uniform control of railroad safety in the FRSA, this court recognized in *Sisk*, 647 F.Supp. at 865, that § 434 of that Act specifically authorizes "exceptions" from such uniformity. For example, the plain language of § 434 indicates that preemption does not occur until the Secretary of Transportation adopts "a rule, regulation, order, or standard covering the subject matter" of the state law. In addition, the state law will not be preempted if it is "necessary to eliminate or reduce an essentially local safety hazard;" is "not incompatible with any Federal law, rule, regulation, order, or standard;" and does "not creat[e] an undue burden on interstate commerce." 45 U.S.C. § 434.

Since no claim is made in this case that the duty to install active warning devices at railroad crossings is essentially a local safety hazard, the second "exception" for preemption discussed above does not apply and will not be addressed herein. As a result, the only question the court must address is whether the Secretary has adopted standards "covering the subject matter" of the duty to install active warning devices at railroad crossings where unusually dangerous conditions exist.[2]

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[2] Since this is the issue the court must address, cases such as *Sisk v. National R.R. Passenger Corp.*, 647 F.Supp. 861, 864 (D. Kan. 1986), are somewhat distinguishable. For instance, in *Sisk* the state law in question was a local ordinance which set the speed limit for trains passing through a city. That ordinance was clearly contrary to train speed limits established by the Secretary. Thus, unlike the present case, in *Sisk* there was no question that the Secretary had issued rules which "covered the same subject matter" as the state law.

The preemption provision in 45 U.S.C. § 434 is keyed to action taken by the Secretary.[3] Furthermore, the preemption provision in the FRSA does not merely relate to those regulations promulgated by the Federal Railroad Administration through powers delegated by the Secretary of Transportation; it relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary. CSX Transp., Inc.*, 901 F.2d at 501. *See also Burlington Northern Railroad Co.*, 880 F.2d at 1106, (the FRSA does not merely preempt state laws which are inconsistent with standards adopted by the Secretary; it preempts all state laws aimed at the same safety concern addressed by standards promulgated by the Secretary).

In asserting that the Secretary has adopted relevant standards in this case, the railroad points out that 23 C.F.R. § 655.601(a) (1990) incorporates by reference the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD).[4] Part VIII of the MUTCD is

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[3] Since § 434 is keyed to action taken by the Secretary, the railroad's citations to highway laws, 23 U.S.C. § 101 *et seq.*, are not helpful. Although such citations may show the Secretary had the power to take the action he did, the Secretary's *power* is not at issue in this suit. Only action actually taken by the Secretary is relevant to the matter now before the court.

[4] The MUTCD was adopted by the Secretary in 1983. It is not separately set forth in the Code of Federal Regulations but is published by the U.S. Department of Transportation, Federal Highway Administration. The MUTCD may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (Stock No. 050-001-81001-8). It

(Continued on following page)

titled, "Traffic Control Systems For Railroad – Highway Grade Crossings." A relevant portion of Part VIII states as follows:

8A-1 Functions

. . . .

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

8A-2 Use of Standard Devices

The grade crossing traffic control devices, systems, and practices described herein are intended for use both in new installations and at locations where general replacement of present apparatus is made, consistent with Federal and State laws and regulations.

. . . .

(Continued from previous page)

is available for inspection and copying as prescribed in 49 C.F.R. Part 7, App. D. 23 C.F.R. § 655.601(a) (1990).

8D-1 Selection of Systems and Devices

The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations.

. . . .

Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

MUTCD, pp. 8A-1 and 8D-1.

The railroad also points out that the MUTCD is adopted as the "national standard for all traffic control devices installed on any street, [or] highway . . . open to public travel," 23 C.F.R. § 655.603(a) (1990), and is the standard for rail-highway grade crossing improvements pursuant to 23 C.F.R. § 646.214(b) (1990). Furthermore, 23 C.F.R. § 655.603(d) states that:

> Each State . . . shall have a program as required by Highway Safety Program Standard Number 13, Traffic Engineering Services (23 CFR 1204.4) which shall include provisions for the systematic upgrading of substandard traffic control devices and for the installation of needed devices to achieve conformity with the MUTCD.

Highway Safety Program Guideline No. 13, Traffic Engineering Services, ¶¶ (I)(D)(5), 23 C.F.R. § 1204.4, states in part that a state's program should have "[a]n implementation schedule to utilize traffic engineering manpower to . . . [a]nalyze potentially hazardous locations, such as sharp curves, steep grades, and railroad grade crossings and develop appropriate countermeasures."

The railroad also points out that 23 C.F.R. Part 646 A (with respect to federal aid highways), and Part 924 (dealing with all other public roads) contain regulations by the Secretary dealing with the upgrading of rail-highway crossings. For instance, 23 C.F.R. § 924.1 says its purpose "is to set forth policy for the development and implementation of a comprehensive highway safety improvement program in each State." The planning component of this program notes that the states are to have a process which will establish "priorities for implementing highway safety improvement projects." 23 C.F.R. § 924.9(a)(4). In addition, to establish such priorities the program is to consider, among other things, "[t]he relative hazard of public railroad-highway grade crossings based on a hazard index formula." 23 C.F.R. § 924.9(a)(4)(iii).

The railroad argues that the above regulations indicate the Secretary has promulgated rules dealing with the duty to install active warning devices at railroad crossings. More specifically, the railroad argues that since the MUTCD states that "[t]he determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority," the state – not the railroad – has the duty to install active warning devices at dangerous railroad crossings.

There are a few cases which have directly addressed the issue of the FRSA's preemptive effect on a railroad's common law duty to use reasonable care when passing through highway crossings. Those cases sharply differ, however, on the applicability and extent of preemption by the FRSA on such a claim.

The pertinent cases can be divided into the following three categories: (1) strict preemption, *Armijo v. The Atchinson, Topeka and Santa Fe Railway, Co.*, Case No. 89-293 SC (D. N.Mex., Nov. 16, 1990); (2) no preemption, *Karl v. Burlington Northern R. Co.*, 880 F.2d 68 (8th Cir. 1989); and (3) contingent preemption, *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).[5]

The railroad's primary argument in this case relies on the strict preemption principles used by the very recent New Mexico case of *Armijo*.[6] The New Mexico court found that the Secretary acted with regard to the installation of warning devices at railroad crossings by the promulgation of the procedures outlined in 23 C.F.R. § 646.200 *et seq.* and by the adoption of the MUTCD as the

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[5] In finding no preemption on the facts before the court, Judge Saffels, in *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50, 54-55 (D. Kan. 1990), relied in part on *Karl* and in part on *Marshall*, but did not state which rationale the court was following. In another very recent case, *Easterwood v. CSX Transportation, Inc.*, 742 F.Supp. 676 (N.D. Ga. 1990), the court basically followed the *Marshall* rationale but concluded preemption applied.

[6] It should be noted that the court in *Armijo*, pp. 10-11, alternatively relies on the hereinafter-to-be-addressed contingent preemption rationale used by the Ninth Circuit in *Marshall*.

national standard. *Armijo*, slip op. at 9. More specifically, the court noted that the MUTCD, Part VIII, ¶ 8A-1, states that "the determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority." *Armijo*, slip op. at 9-10. As a result, the court concluded that any New Mexico state common law or statutory law placing a duty on the railroad to determine the need and selection of the appropriate warning devices at a railroad crossing was preempted by the FRSA because the Secretary had adopted rules covering that subject matter within the meaning of § 434. *Id.* at 10.

The *Armijo* opinion is well reasoned and sets forth a persuasive argument for adoption of the strict preemption standard. However, the result of using that standard is terribly inequitable and contrary to the recognized view that "§ 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted." *Southern Pacific Transp. v. Public Utilities Com'n*, 647 F.Supp. 1220, 1225 (N.D. Cal. 1986), *Aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987).

For instance, if the strict preemption view is adopted, then preemption of the railroad's common law duty occurred either in 1983, when the MUTCD was first adopted by reference by the promulgation of 23 C.F.R. § 655.601(a), or in 1975, when the Secretary first promulgated 23 C.F.R. § 646.200 *et seq.* However, the relevant state or local authorities would not yet have had a duty to replace or upgrade the warning device at an unreasonably dangerous crossing on either of those effective dates.

Part VIII of the MUTCD, ¶ 8A-2, specifically notes that its standards are only "intended for use both in new installations and at locations where general replacement of present apparatus is made." Thus, by its own terms the MUTCD would not apply to a crossing until a formal decision was made to install either a new or a different warning device. In addition, 23 C.F.R. § 646.200 *et seq.* (specifically §§ 646.216(d), 646.218, and 646.220) require an agreement to be entered into between the railroad and the state before federally reimbursable improvements at a grade crossing may be made. Plus, §§ 646.216(d) and 646.218 require FHWA approval before federally reimbursable improvements may be made at the crossing in question.

Therefore, contrary to the mandate in *Southern Pacific*, there would be a gap in the duty to protect against unreasonably dangerous crossings between the time the referenced regulations were promulgated by the Secretary and a formally enforceable decision was made by the state as to the proper device to be used at a particular crossing. Such a rule, instead of promoting railroad safety at crossings, as the FRSA was intended to do, would actually foster retarded improvement of warning devices at such crossings. That is, the railroad would have little or no incentive to make necessary improvements at crossings which were known to be unreasonably dangerous. Moreover, the railroad would likely be much less eager to notify relevant state authorities of crossings known to be unreasonably dangerous and to enter into required agreements with the state for improvements of such crossings. Thus, the probability that the decision to upgrade an

unreasonably dangerous crossing would get lost in a bureaucratic shuffle would be much greater.

Furthermore, no regulation promulgated by the Secretary has been brought to the attention of the court which would *prohibit* a railroad from voluntarily deciding to put in place an improved warning device at a crossing during the gap period. That is, as already indicated, ¶ 8A-2 of the MUTCD specifically notes that the standards therein set forth are only intended to apply when the state actually makes a decision to improve a crossing. Moreover, the provisions in 23 C.F.R. § 646.200 *et seq.* only apply to a crossing after an agreement is entered into between the railroad and the state (and in some instances only after FHWA approves the state-railroad agreement). As a result, it appears a railroad still has the authority to decide to install an improved signal device at an unreasonably dangerous crossing during the gap period.

Because of the above reasons, the court declines to follow the strict preemptive view. Next, the court will address the no preemption theory used by *Karl v. Burlington Northern R. Co.*, 880 F.2d 68 (9th Cir. 1989).

The court in *Karl* did not address the referenced explicit preemption language in 45 U.S.C. § 434 or the legislative history which clearly indicates a congressional intent for nationally uniform standards of railroad safety. Moreover, in setting forth general preemption standards, the *Karl* court said that, "state laws may be preempted if they actually conflict with an express or implied federal declaration, or if the state law is in a field that is so pervasively controlled by federal law that no room is left for state rulemaking." *Karl*, 880 F.2d at 76. Thus, *Karl* did

not recognize the first example of preemption used by the Supreme Court in *English*, 110 L.Ed.2d at 74 (where Congress explicitly defines the extent to which it preempts state law, *see Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 95-98). Since this court has already found that type of preemption applies to this case, the reasoning used in *Karl* is not persuasive.

The only other circuit court to directly address the issue of whether the FRSA preempts the common law duty of a railroad to provide adequate warning at railroad crossings is *Marshall v. Burlington Northern, Inc.* There, in finding no preemption on the facts before the court, now-Justice Kennedy said:

> The [MUTCD] prescribes that the selection of devices at grade crossings and the approval for federal funds is to be made by local agencies with jurisdiction over the crossing. Thus, the Secretary has delegated federal authority to regulate grade crossings to local agencies.
>
> *The locality in charge of the crossing in question has made no determination under the manual regarding the type of warning device to be installed at the crossing. Until a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing, the railroad's duty under applicable state law to maintain a "good and safe" crossing is not preempted.*

720 F.2d at 1154 (emphasis added; citation omitted).

This court refers to the rule used in *Marshall* as contingent preemption because, as is evident from the above quote, it recognizes the preemptive effect of 45 U.S.C. § 434 but holds the extent of that preemption is

limited, and, in that case, has not yet occurred. More specifically, Justice Kennedy found that under the regulatory scheme of the Secretary, preemption of a state-imposed duty on the railroad to provide adequate warnings at railroad crossings was not preempted until the responsible state agency made a determination regarding the type of warning device to be installed. This rule makes the most sense, given the present regulatory scheme and other practical considerations.

For instance, as has already been noted, ¶ 8A-2 of the MUTCD indicates that the MUTCD does not apply to a crossing until a formal decision is made to install either a new or different warning device at the crossing. In addition, no regulations have been brought to the attention of the court which would prohibit a railroad, during the "gap" period, from voluntarily implementing improved safety devices at railroad crossings known to be unreasonably dangerous.

Moreover, this rule furthers the FRSA policy of promoting railroad crossing safety. That is, since the railroad is still responsible for unreasonably dangerous crossings during the gap period, the railroad itself is encouraged to improve the warning device in use at such a crossing. This rule also strongly encourages the railroad to cooperate with state and federal authorities to obtain regulatory approval of improvements to warning devices in use at a crossing. *See McMinn v. Consolidated Rail Corp.*, 716 F.Supp. 125, 127, n. 5 (S.D.N.Y. 1989) (recognizes part of the railroad's duty in guarding against unreasonably dangerous crossings entails seeking regulatory approval for the necessary improvements, and if the railroad is not vigorous in its attempts to gain the proper authorizations,

then it is inappropriate to absolve the railroad of liability). *See also* Kan. Admin. Regs. 82-7-4(a) (specifically notes that the railroad can request the Kansas Corporation Commission to inspect any railroad crossing and the Commission then has to make a designation of whether or not the crossing is dangerous).

However, the railroad argues that even if the court follows the *Marshall* rationale in this case, the latest date of preemption would be when KDOT placed the crossing in question on the improvement list in 1985. The railroad reasons that the only prerequisite for preemption is for the state to give some indication as to the "adequacy" of the warning device at a particular crossing. It bases this rationale on the fact that the court in *Marshall* said that "[u]ntil a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing, the railroads's [sic] duty under applicable state law to maintain a 'good and safe' crossing . . . is not preempted." 720 F.2d at 1154 (citation omitted). This argument is flawed for several reasons.

For instance, such argument ignores the "gap" period problems and ignores the fact that the MUTCD, at ¶ 8A-2, seems to indicate that the MUTCD does not apply to a crossing until a formal decision is made to install either a new or different warning device at the crossing. More importantly, however, the railroad's reasoning ignores the sentence immediately before the relied on language.

That sentence states that the relevant state authority had "made no *determination* under the manual regarding the *type of warning device to be installed* at the crossing."

Marshall, 720 F.2d at 1154 (emphasis added). This sentence clearly seems to modify the court's conclusion in the next sentence that no "federal decision [had been] reached through the local agency on the adequacy of the warning devices at the crossing." *Id.* As a result, the court finds that the rationale in *Marshall* mandates a finding that preemption does not occur until a "determination under the [MUTCD] regarding the type of warning device to be installed at the crossing" is made. *Id.*

A good argument can be made that no "determination" is made by the relevant state agency concerning the "type of warning device to be installed" until a formal enforceable agreement is entered into for the installation of such warning device. For instance, 23 C.F.R. §§ 646.216(e), 646.218, and 646.220 all require a formal agreement to be entered into between the railroad and the relevant state agency before federal funds are available for the improvement of a railroad crossing warning device. In addition, projects seeking federal funding under either § 646.216 or § 646.218 require FHWA approval before the state-railroad agreement is an enforceable agreement. Thus, in those cases where FHWA approval of the state-railroad agreement is required (i.e., § 646.216(e) or § 646.218 applied), preemption would not occur until such approval was forthcoming. In those case [sic] where FHWA approval is not necessary (i.e., § 646.220 applies), preemption would occur as soon as a formal state-railroad agreement was entered into.

It should also be noted that subparagraph (d)(1)(ii) of § 646.220 requires compliance with 23 C.F.R. § 140, Subpart I. Section 140.916, which is within Subpart I, states that:

> The cost of essential protective services which, in the opinion of a railroad company, are required to ensure safety to railroad operations during certain periods of the construction of a project, is reimbursable provided an item for such services is incorporated in the State-railroad agreement or in a work order issued by the State and approved by FHWA.

This provision is important for two reasons. First, it recognizes that the Secretary intended the railroad to be responsible for some aspects of railroad safety even during construction (i.e., after a formal agreement was entered into). Second, it recognizes that the entering into of the state-railroad agreement is a time for switching of duties.

Thus, since many duties and obligation [sic] are either incurred or switched by the entering into of an enforceable state-railroad agreement, it would be reasonable to assume that preemption also occurs at such time. However, given the established facts in this case, it is not necessary for the court to determine in this case whether preemption does not occur until the entering into of the agreement.

The *Marshall* rule mandates that preemption does not occur until a "determination" is made as to the "type of warning device to be installed." An established fact in this case is that KDOT did not approve the project to install signals at the crossing in question until December 28, 1987. If the *Marshall* rule is applied to such established fact, the court must conclude the *earliest* time preemption

could have occurred was on December 28, 1987.[7] Since the accident in question occurred on September 29, 1987, the court finds that preemption of the railroad's common law duty to provide an active or additional warning device at a crossing believed to be unreasonably dangerous had not yet occurred.

An alternative argument made by the railroad is that Kansas has, by statutes and regulations, changed the common law duty of the railroad. For instance, the railroad notes that Kansas has said by statute that the Kansas Secretary of Transportation, the State Corporation Commission, or in some instances local authorities, may designate railroad crossings which are dangerous and need installation of different safety devices. K.S.A. §§ 8-1552, 8-2005, 66-231a, and 68-414. Plus, the MUTCD has been specifically adopted in Kansas and is to be used by the authorities in making upgrade determinations. K.S.A. §§ 8-2003, 66-231a, and Kan. Admin. Regs. 82-7-4(c) (1989). This argument is not persuasive.

The cited sections merely recognize that the state has the *authority* to require the railroad to install a different warning device if the state determines the crossing to be dangerous. No state law is brought to the attention of the court which requires state authorities, and only state authorities, to make the determination that a crossing is unreasonably dangerous. Furthermore, K.S.A. 66-231a states that:

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[7] Thus, the later date of when an enforceable state-railroad agreement was actually entered into is irrelevant given the established facts in this case.

> The provisions of this section shall be deemed to provide an additional and alternative method of providing for safety at railroad grade crossings and shall be regarded as supplemental and additional to powers conferred by other state laws.
>
> Notwithstanding the foregoing provisions of this section, nothing herein shall be construed as affecting the civil liability of any entity for the maintenance or designation of any railroad crossing.

This section seems to clearly indicate that the legislature did not intend to change the railroad's common law duty. Finally, as the court has recognized, the standards in the MUTCD do not apply until a formal decision to install a new or different warning device is made.

Therefore, as more fully set forth above, the court finds the common law rule, that where unusually dangerous conditions exist at a railroad crossing "additional warnings and precautions by the railroad company may be necessary," is unaffected by the arguments of the railroad in the present case. *Sexsmith*, 209 Kan. at 108.

IT IS THEREFORE ORDERED this 7th day of February, 1991, that Burlington Northern Railroad Company's motion for partial summary judgment (Dkt. No. 62) is denied.

/s/ Patrick F. Kelly
PATRICK F. KELLY, JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT E. HATFIELD, Plaintiff-Appellee, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant-Appellant.	)	No. 91-3158

ORDER
Entered April 23, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges, and ALLEY* District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

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* Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Ebel did not participate in consideration of the en banc suggestion.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

Executive Order 12612 of October 26, 1987

Federalism

52 F.R. 41685

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual states. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government – whether legislative, executive, or judicial in nature – that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of – and should encourage opportunities for – individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs")

remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications. Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4 *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to

be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19. Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

/s/ Ronald Reagan

THE WHITE HOUSE,

October 26, 1987.